STATE OF MICHIGAN

COURT OF APPEALS

MARSHALL E. MUNGER,

Plaintiff-Appellant,

v

TRANSGUARD INSURANCE COMPANY OF AMERICA, INC.,

Defendant-Appellee.

UNPUBLISHED
June 18, 2009

No. 284574
Genesee Circuit Court
LC No. 07-087405-CZ

Before: O'Connell, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) in this declaratory action involving an insurance policy for injury sustained in an "accident." Because reasonable minds could not differ that plaintiff did not sustain accidental injury, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, a tractor and trailer operator, was employed delivering trailers to various locations as dispatched. His delivery of trailers routinely required the raising and lowering of "dolly legs" to both move and place or set trailers. On this occasion plaintiff experienced a sharp pain in his leg and back as he was squatting under a trailer and turning a manual crank to engage the dolly legs in a manner that he had done "hundreds of times" over the previous few years. He was diagnosed with a herniated disk at the L4-L5 level. He filed this action to recover benefits under an accident benefit insurance policy issued by defendant. The policy provides, in pertinent part:

> We will pay the benefits set forth below when we receive due proof that:
>
> 1. The Insured Person sustained an Injury in an Accident.

The definitions section of the policy provides:

> Accident: An unforeseeable, unexpected and unintended event. Something that could not be foreseen as a consequence of an undertaking and is definite to time and place.

* * *

> Injury: means with respect to benefits payable under this Coverage Part, trauma or damage to some part of the body caused by an Accident . . . .

Plaintiff contends that his injury was sustained in an accident, specifically, "the creation of forces on his spine" and the "torquing of the disc." The trial court agreed with defendant that the injury was not sustained in an "accident" and granted defendant's motion for summary disposition under MCR 2.116(C)(10).

Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood,* 461 Mich 109, 118; 597 NW2d 817 (1999).

Plaintiff's attempt to characterize the creation of forces on the spine and the torquing of the disc as an "accident" is flawed because the force and torquing were produced by plaintiff's voluntary movement. When a person squats with a leg extended and bends backward, it is foreseeable that the motion of turning a crank will create forces on the spine. Regardless of whether the *injury* was unforeseeable, unexpected, and unintended, to satisfy the definition of "accident" in the policy, the injury must be caused by an *event* that was unforeseeable, unexpected, and unintended. The exertion of forces on the spine as a result of voluntary movements is not an unforeseeable event and does not qualify as an "accident" as defined in the policy.

In *Rynerson v Nat'l Cas Co,* 203 Mich App 562; 513 NW2d 436 (1994), the plaintiff sought to recover benefits for accidental injury under a group accident policy with the defendant insurer when he suffered a cerebral hemorrhage after attempting to strenuously turn a bolt while repairing his truck. *Id*. at 563-564. This Court stated,

> The policy in this case entitles plaintiff to benefits for an "accidental bodily injury . . . which is the direct result of an accident . . . ." The clear meaning of the language requires not only an accidental injury, but an 'accidental means' or accidental cause as well. This combination of phrases unambiguously indicates that the unexpected nature of the injuries following voluntary acts does not, by itself, entitle an insured to benefits under the policy. The incident or activity that is the cause of the accidental injury must also be accidental. [*Id*. at 567.]

Here too, plaintiff, while in the course of his employment, voluntarily engaged in the routine function of cranking a trailer's dolly legs. His voluntary action while performing his work was the foreseen consequence of an undertaking that resulted in his foreseeable injury, and therefore, an uninsured or not covered event.

Plaintiff relies on a letter that one of his doctors sent to another doctor, which states that plaintiff "slipped and twisted his back in a near fall episode." In his deposition, however, plaintiff did not describe a "slip" or a "near fall," and denied that anything else happened during the cranking incident. Just as a party may not create a factual dispute by submitting an affidavit that contradicts his sworn testimony, *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 396; 729

NW2d 277 (2006), a medical record that purports to paraphrase a plaintiff's statements that conflicts with the plaintiff's sworn deposition testimony is inadequate to create a genuine issue of material fact. Because reasonable minds could not differ that plaintiff failed to meet his burden of creating a justiciable question of fact that his injury was sustained as the result of an "accident" as defined in the insurance policy, the trial court properly granted the motion for summary disposition.

Affirmed.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio